**COMMONWEALTH OF MASSACHUSETTS**
**DEPARTMENT OF TELECOMMUNICATIONS AND CABLE**

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| Comcast of Massachusetts III, Inc.<br><br>*Complainant*,<br><br>v.<br><br>Peabody Municipal Light Plant and Peabody Municipal Lighting Commission<br><br>*Respondents*. | D.T.C. 14-2 |

## COMCAST'S PHASE I REPLY BRIEF

Comcast of Massachusetts III, Inc. ("Comcast") hereby submits its Reply Brief in response to the Phase I Initial Brief filed by the Department of Public Utilities ("DPU") on July 8, 2014 ("DPU Brief") and the Phase I Joint Brief of Peabody Municipal Light Plant and Peabody Municipal Lighting Commission (collectively, "PMLP") and Ashburnham Municipal Light Plant ("AMLP") filed on July 8, 2014 ("PMLP Joint Brief").

The Comcast and DPU Briefs demonstrate that, as a matter of law, the Massachusetts Formula applies to municipal lighting plants ("MLPs"), including PMLP and AMLP.[1] By the explicit terms of G.L. c. 166, § 25A ("Section 25A"), MLPs are "utilities" and the Department is authorized to establish just and reasonable rental rates for Comcast and other "licensees" to

[1] As explained in the initial briefs, the Massachusetts Formula was established and confirmed by the Department's predecessor, the Department of Telecommunications and Energy ("DTE") in *Cablevision of Boston Co., et al. v. Boston Edison Co.*, 1998 WL 35235111 (Apr. 15, 1998) ("*Cablevision of Boston*") and *A-R Cable Services, Inc., et al. v. Massachusetts Electric Co.*, D.T.E. 98-52 (Nov. 6, 1998) ("*A-R Cable Services*"). DPU Brief at 4-6; Comcast's Initial Phase I Brief at 4-7 ("Comcast Brief").

attach to poles owned by "utilities," including PMLP.[2] In order to comply with its statutory mandate, the DTE established the Massachusetts Formula "to estimate the fully-allocated costs of pole attachments . . . consistent with [Section 25A] . . ." and determined that the Formula "reasonably balances the interests of subscribers of CATV services as well as the interests of consumers of utility services as required by [Section 25A]."[3] Moreover, rates set pursuant to the Massachusetts Formula are fully compensatory to PMLP and other pole owners and do not subsidize attachers. The Formula promotes the Department's "goal of resolving pole attachment complaints by a simple expeditious procedure based on public records so that all of the parties can calculate pole attachment rates as prescribed by the Department without the need for our intervention."[4] Indeed, the Massachusetts Formula was established to efficiently resolve precisely this type of dispute between PMLP and Comcast.[5]

By contrast, PMLP and AMLP fail to provide any legal or other justification for their position that the Massachusetts Formula does not apply to MLPs as a matter of law.[6] As explained below, the PMLP Joint Brief's itemization of alleged distinctions between investor-owned utilities ("IOUs") and MLPs are truly distinctions without a difference when it comes to calculating pole attachment rates under Section 25A – any relevant differences can be easily accommodated by adjusting inputs to the Massachusetts Formula in Phase II. Moreover, the

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[2] DPU Brief at 4-5; Comcast Brief at 4.

[3] *A-R Cable Services* at 7.

[4] *Cablevision of Boston* at 19.

[5] As explained in *A-R Cable Services*, "[p]ole attachment complaint proceedings are not meant to be costly, full blown rate cases, but rather streamlined proceedings based on publicly available data." *A-R Cable Services* at 7.

[6] Unlike its position in its Response to Comcast's Complaint, PMLP now appears to concede that Section 25A applies to its pole attachment rates and only raises the alleged distinctions to argue that the Massachusetts Formula does not comply with Section 25A "with regard to MLPs." *Compare* Comcast Brief at 3 n.2 *with* PMLP Joint Brief at 3, 10, 14, 16, and 19.

PMLP Joint Brief continues to mischaracterize the Massachusetts Formula by alleging that it does not allocate the costs of the support space to attachers thereby creating a "cross-subsidy" – in fact, the Formula allocates the cost of the entire pole (usable *and* support space) to attachers as directed by Section 25A. Finally, the Legislature's decision to explicitly authorize the Department to regulate the pole attachment rates of MLPs consistent with Section 25A establishes that application of the Massachusetts Formula to PMLP and other MLPs creates no improper intrusion into the statutory authority of MLPs to set local electric rates.

Accordingly, the Department should rule that Section 25A and the Massachusetts Formula apply to MLPs, including PMLP and AMLP, as a matter of law.

## I. THERE ARE NO DIFFERENCES BETWEEN IOUs AND MLPs IMPACTING APPLICATION OF THE MASSACHUSETTS FORMULA

PMLP goes to great lengths enumerating alleged "significant and fundamental differences" between MLPs and IOUs based on their "separate statutory schemes."[7] PMLP claims that prior decisions of the DPU recognize these differences thus "render[ing] the [Massachusetts] Formula inapplicable to MLPs."[8] However, PMLP has failed to explain how any alleged differences warrant a different pole attachment rate formula for MLPs and it fails to acknowledge that through Section 25A, the legislature specifically determined to treat MLPs and IOUs in the same manner regarding setting pole rental rates.[9] Indeed, PMLP refers to a 1996 DPU decision to support its position that that the Massachusetts statutory scheme "distinguishes"

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[7] *See* PMLP Joint Brief at 2-10.

[8] *Id.* at 2.

[9] If the Legislature wanted to treat MLPs differently, it would have provided for it – as it did with respect to wireless attachments. *See* Comcast Brief at 3 n.2.

between IOUs and MLPs.[10] However, PMLP neglects to also quote a subsequent sentence in the same paragraph on that same page of the decision where the DPU notes: "[t]here are, however, areas where the statute and regulations *apply equally* to municipals and IOUs."[11] Here the Legislature made it clear that Section 25A "applies equally" to setting pole attachment rental rates for IOUs *and* MLPs.

As Comcast explained in its Initial Brief and as more fully discussed in Section II below, the reality is that the Massachusetts Formula is easily applied to MLPs, and the Formula captures all the relevant MLP and IOU investment and cost information associated with establishing just and reasonable rates for pole attachments in accordance with Section 25A.[12] Most of the "differences" identified by PMLP exist with respect to individual IOUs to some degree in each of the 30 states where the FCC Formula directly applies, as well as in the majority of certified states that have adopted methods based on the FCC Formula to calculate attachment rates.[13] The

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[10] PMLP Joint Brief at 3 (quoting *Investigation by the Department of Public Utilities upon its own motion commencing* a *Notice of Inquiry/Rulemaking, pursuant to 220 C.M.R. 2.00 et seq., establishing the procedures to be followed in electric industry restructuring by electric companies subject to G.L. c. 164,* D.P.U. 96-100, at 32 (May 1, 1996)) ("DPU 96-100").

[11] D.P.U. 96-100 at 32 (citations omitted) (emphasis added).

[12] Comcast Brief at 7-12.

[13] Each state has its own separate regulatory scheme relating to utilities that may impact an IOU's scope of activities, sale and merger procedures, retail choice, ratemaking and accounting. However, these differences do not make the FCC Formula inapplicable because calculating just and reasonable pole rates is not impacted by such differences, and the Formula is designed to allow for inputs specific to each utility so that relevant costs are recovered. This is also true with respect to local oversight, audit and inspection procedures applicable to MLPs – any relevant pole related cost inputs are captured by the Formula. Comcast Brief at 6-8. For example, the absence of any nexus with calculating pole rates is apparent in the successful application of the FCC Formula to IOUs in states with and without competitive choice. Seventeen states have adopted energy choice while the remaining states have not. *See* http://www.eia.gov/todayinenergy/detail.cfm?id=6250. Similarly, charitable contributions are not part of the cost of owning and maintaining poles and therefore are not a carrying charge component of the Massachusetts Formula for IOUs either. Charitable contributions made by IOUs are booked to FERC Account 426.1, which is expressly *not* included in the Massachusetts Formula.

fact that the FCC Formula applies to calculate attachment rates for electric and *telephone* companies alike – utilities that have more differences from an organizational and accounting standpoint than electric IOUs and MLPs have – demonstrates that the differences referenced by PMLP have no bearing on use of the Massachusetts Formula to calculate MLP attachment rates.[14]

To the extent that PMLP has identified any differences that bear on pole attachment calculations, the Massachusetts Formula is sufficiently flexible to modify inputs to the formula to accommodate such differences. For example, as noted by PMLP (and by Comcast in its Initial Brief), MLPs do not incur a tax expense, so Comcast has suggested permitting PMLP (to PMLP's benefit) to use its "contributions in lieu of taxes" as a proxy for the tax carrying charge component of the Massachusetts Formula.[15] The appropriateness of such minor, common sense input adjustments to the Massachusetts Formula will be addressed in Phase II.

## II. THE MASSACHUSETTS FORMULA CAN BE EASILY APPLIED TO MUNICIPAL LIGHTING PLANTS

PMLP asserts that the Massachusetts Formula cannot be applied to MLPs "because the information that goes into the calculation for each step differs between MLPs and IOUs."[16] This is simply wrong, as Comcast demonstrated in its Initial Brief[17] and as further addressed below.

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[14] Under FCC rules, local exchange carrier pole attachment rates are calculated under the FCC Formula applying accounting data from the FCC's publicly available ARMIS ("Automated Reporting Management Information System") accounting system applicable to LECs instead of FERC Form 1 data applicable to electric IOUs. 47 C.F.R. § 1.1404(g)(2).

[15] Comcast Brief at 9. The fact that MLPs are not subject to taxes is of no consequence with respect to the Massachusetts Formula, which allows for the recovery of pole-related costs. If there is no actual tax liability, then there is no legitimate cost for the MLP (or an IOU for that matter) to recover for this Formula input.

[16] PMLP Joint Brief § II(A)(2).

[17] Comcast Brief at 7-11.

The basic mechanics of applying the Massachusetts Formula to IOUs and MLPs are shown in Exhibit 1 (attached hereto), which illustrates that all the relevant Formula inputs for IOUs and MLPs are available from public reports. Consequently, the Massachusetts Formula accomplishes the Department's objective for IOUs and MLPs – "to have a simple, predictable, and expeditious procedure that will allow parties to calculate pole attachment rates. . . ."[18]

**1. Accounting Reports**. While MLPs do not file FERC Form 1 reports, the inputs of the Massachusetts Formula are from "publicly available data,"[19] which includes "Form M, FERC 1 *or other reports filed with state or regulatory agencies*."[20] MLPs file annual reports (Form AC 19 – Annual Return for Municipal Lighting Plants) with the DPU pursuant to G.L. c. 164, § 63 and 220 C.M.R. §§ 79.00 *et seq.*, and these publicly available reports contain virtually the same pole-related investment and expense inputs relevant to the Massachusetts Formula as do FERC Form 1 reports.

**2. Net Investment in Poles Component.** This element of the Massachusetts Formula is fundamentally the same for MLPs and IOUs, as more fully explained below.

*Accumulated Depreciation.* PMLP states that "Under the [Massachusetts] Formula, the net investment in bare poles is determined by reducing the gross pole investment by the amounts for accumulated depreciation and accumulated deferred taxes" and asserts '[t]his is

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[18] *A-R Cable Services* at 7.

[19] *See Cablevision of Boston* at 19 ("The intent of the Department ... is to promote the goal of pole attachment complaints by a simple and expeditious procedure based on *public records* . . . . The Department finds that adopting a method that relies on *publicly available* data will facilitate the resolution of pole attachment rate complaints without the need for Department intervention.") (emphases added); *A-R Cable Services* at 7.

[20] 220 CMR § 45.04(2)(d) (emphasis added).

completely inapplicable for MLPs."[21] However, MLPs *directly report* both their gross investment in poles (Account 364) on page 8B of their annual reports[22] and their net investment in poles on page 17.[23] The net pole investment figure reported by MLPs reflects the deduction of accumulated depreciation from their gross investment in poles.[24] Accordingly, an MLP's accumulated depreciation can be determined by simple subtraction of actual reported values.[25] The Formula's use of net investment is therefore directly applicable to PMLP. That the input value is determined based on a more detailed level of reporting cannot logically render the "net investment" concept inapplicable.[26] Moreover, for both MLPs and IOUs, depreciation is a source of cash for capital investment,[27] and as recognized by the DPU in a decision cited by PMLP, to ignore this source of cash generation for MLPs (by applying a return to gross versus net depreciated plant) would be inappropriate and result in a double return to the utility.[28]

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[21] PMLP Joint Brief at 12.

[22] *See* Comcast Complaint, Exhibit 14 (PMLP's 2012 Annual Report), page 8B, Row 6.

[23] *See id.*, page 17, Row 6.

[24] *See* Exhibit 1, Row B.

[25] For PMLP, its 2012 Annual Report indicates $9,236,494.06 as gross pole investment and $2,799,091.72 as net pole investment. *See* Comcast Complaint, Exhibit 14, page 8B, Row 6 and page 17, Row 6. The difference between these values reflects PMLP's accumulated depreciation for poles, which is $6,437,402.34.

[26] PMLP Joint Brief at 12. PMLP also cites a DPU decision to recognize that depreciation is a source of cash not a measure of asset life. *Id.* In that decision, the DPU found that "there should be no difference in the treatment of IOUs and municipals on the issue of use of net plant in the calculation of the allowed return. The inclusion of previously depreciated plant in the calculation of the statutorily allowed return by [the MLP] results in ratepayers repeatedly paying a return of and a return on utility plant. We find that procedure to be inappropriate, and contrary to sound regulatory accounting practices. *The Department finds unpersuasive the argument that the use of net plant should not be applied to municipals because [the MLP] has no stockholders and therefore has less flexibility in raising cash.*" *Reading Municipal Light Department*, D.P.U. 85-121/85-138/86-28-F, at 9 (Oct. 21, 1987) (emphasis added).

[27] *See* PMLP Joint Brief at 11-12 ("MLPs use the depreciation rate as a mechanism for internal cash generation to be used as capital.").

[28] *See* note 26 *supra*.

*Accumulated Deferred Taxes.* As discussed, MLPs are non-taxpaying entities and, as such, do not incur accumulated deferred taxes. This point does not however affect the applicability of the Formula to MLPs, as PMLP suggests, only that the appropriate value for this particular input to the Formula is zero.[29] A zero dollar amount for ADT is a perfectly acceptable input value, and in fact, a zero dollar amount can be an appropriate input value for a tax-paying IOU.

3. **Carrying Charge Components**. With respect to the carrying charge components of the Massachusetts Formula, PMLP asserts that "MLPs do not . . . submit the same accounting information on their returns to the DPU."[30] As explained below, and as illustrated in Exhibit 1, this is incorrect.

*Administrative Expenses.* Accounts 920-932 set forth PMLP's administrative expenses which are reported annually on pages 41-42 of PMLP's annual report. *See* Comcast Complaint, Exhibit 14 (PMLP's 2012 Annual Report), page 41, Rows 41-55 and page 42, Rows 1-4.[31]

*Maintenance Expenses.* Account 593 sets forth PMLP's maintenance expenses and these are reported on page 41 of PMLP's annual report. *See* Comcast Complaint, Exhibit 14 (PMLP's 2012 Annual Report), page 41, Row 18.

*Depreciation Expense.* Both IOUs and MLPs depreciate the pole plant annually based on a fixed depreciation percentage. For example, Boston Edison's depreciation

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[29] *See* Exhibit 1, Rows C, L and R.

[30] PMLP Joint Brief at 11.

[31] "Maintenance of General Plant" expenses are booked to Account 932 for MLPs in their annual reports and to Account 935 of the FERC Form 1 for IOUs.

rate in *Cablevision of Boston* was 2.38%,[32] while Massachusetts Electric's depreciation rate in *A-R Cable Services* was 4.0%.[33] PMLP states that its depreciation rate "is fixed by statute at 3% of the cost of the plant,"[34] (although it used a depreciation rate of 3.25% in its first pole attachment rate calculation).[35] That the MLP's depreciation rate may be set by statute versus explicitly based on the life of its asset has no bearing on the applicability of this expense element of the formula. As mentioned above, although it is an expense element for both IOUs and MLPs, depreciation is a "source" of cash for capital funding (not an actual outlay of cash).[36] The Massachusetts Formula captures pole-related depreciation expenses for each of MLPs and IOUs in a neutral manner,[37] and for both, the inclusion of a depreciation expense element in the Massachusetts Formula in addition to a rate of return element provides a very generous amount of cost recovery in excess of the "additional costs" to the utility of providing attachments.

*Taxes.* PMLP asserts that the tax-related elements of the Massachusetts Formula are "inapplicable to MLPs."[38] While it is true that, unlike IOUs, MLPs do not have tax expenses, this fact does not warrant *higher* pole attachment fees for MLPs, as PMLP would prefer. The absence of a particular cost input to the Massachusetts Formula (such as taxes) certainly does not cause the Formula to be inapplicable – only that the applicable input value may be zero. In any event, Comcast has suggested that PMLP's contributions in lieu of taxes be

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[32] *Cablevision of Boston* at 54, Row X.

[33] *A-R Cable Services* at 32, Row X.

[34] PMLP Joint Brief at 12.

[35] *See* Comcast Complaint, Exhibit 8, page 5, Row 2 ("Depreciation rate for poles, towers and fixtures ... 3.25%.").

[36] *See* note 26 *supra.*

[37] *See* Exhibit 1, Rows X-BB.

[38] *Id.*

used as an appropriate proxy for the normalized tax component of the Massachusetts Formula.[39] These payments are reported in MLP's annual report. *See* Comcast Complaint, Exhibit 14 (PMLP's 2012 Annual Report), page 21, Rows 24-25.

*Interest.* PMLP suggests that MLPs should be permitted to include interest expense as an additional carrying charge component of the Massachusetts Formula because "MLPs are entitled to treat interest expense as a direct (above the line) expense chargeable to ratepayers."[40] This argument misses the point. Third-party attachers are not electric "ratepayers," and the Massachusetts Formula includes only those expenses that are related to the costs of owning and maintaining utility poles. Accordingly, interest is not an input to the Massachusetts Formula, and any different treatment for IOUs and MLPs under Massachusetts Law for *electric rate-making purposes* is irrelevant for the purposes of computing a maximum lawful pole attachment rate.[41] Nevertheless, MLPs will receive an effective recovery of interest expense in the rate of return element of the carrying charges applicable to pole investment – to receive both would be excessive recovery of capital related expenses.

*Rate of Return.* PMLP contends that "[r]ate of return has absolutely no applicability to MLPs" and that a return is "discretional" for MLPs.[42] The logical result of these assertions is a *zero* rate of return element of the Massachusetts Formula. PMLP previously

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[39] Comcast Brief at 9.

[40] PMLP Joint Brief at 12.

[41] In any event, PMLP has *no* long term debt (*see* Comcast Complaint, Exhibit 14, page 11, Rows 9-12) and earned a *net positive* amount of interest of $570,001 in 2012. *Compare* Comcast Complaint, Exhibit 14, page 12, Row 17 (showing PMLP's interest income to be $587,751.84) *with* Row 30 (showing PMLP's other interest expenses to be $17,751.08).

[42] PMLP Joint Brief at 13.

represented to Comcast that it has a "utility 'margin' on poles, towers and fixtures" of 5%,[43] which suggests that PMLP does indeed seek a profit margin or return in its pole rental fees. Indeed, PMLP now demands the statutory maximum of 8%,[44] which applies to retail electric services,[45] not pole attachments. Despite the fact that PMLP is a non-profit, debt-free, government-owned entity with a massive amount of "unappropriated earned surplus" that provides it with cost recovery in excess of its actual economic cost of capital,[46] Comcast nonetheless has maintained throughout this proceeding that a reasonable cost of capital proxy for the rate of return element is appropriate for PMLP specifically, and MLPs generally.[47] The appropriate amount of this input to the Massachusetts Formula can be determined in Phase II.

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As Comcast demonstrated in its Initial Brief, each of the three major components of the Massachusetts Formula – net investment in poles, carrying charges, and space allocation – are fundamentally the same for MLPs and IOUs.[48] PMLP's position not only conflicts with Section 25A but would turn every pole rate complaint proceeding involving an MLP into a quagmire.

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[43] *See* Comcast Complaint, Exhibit 8, page 5.

[44] *See* PMLP Answer, La Capra Affidavit, Appendix B, Exhibit 3, Row 18.

[45] *See* G.L. ch. 164, § 58.

[46] *See* Comcast Brief at 9-10.

[47] *See* Comcast Complaint ¶ 26; Comcast Brief at 10.

[48] *See* Comcast Brief at 7-12.

## III. THE MASSACHUSETTS FORMULA DOES NOT SUBSIDIZE ATTACHERS

PMLP erroneously asserts that the Massachusetts Formula will result in prohibited "cross-subsidies" if it is applied to MLPs.[49] This contention is based on the faulty premise that the Massachusetts Formula does not require attachers to pay the costs of the support space (*i.e.*, the "unusable space") on the pole.[50] As explained in Comcast's Brief, the FCC has rejected this argument explaining that it is a "complete mischaracterization" of the FCC Formula (and accordingly the Massachusetts Formula) to say that it does not cover the cost of the entire pole – usable *and* unusable space.[51]

Moreover, the cost allocator in the Massachusetts Formula (objected to by PMLP) is *required* by Section 25A and is applicable to all "utilities" including MLPs. Under the statute, the Department is required to set a maximum pole attachment rate at no more than "the proportional capital and operating expenses of the utility attributable to that portion of the pole . . . occupied by the attachment. *Such portion shall be computed by determining the percentage of the total usable space on the pole . . . .*"[52] Thus, contrary to PMLP's faulty assumption, the Massachusetts Formula requires attachers to pay proportionately for the cost of the *entire* pole – *unusable* as well as the usable space.[53]

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[49] PMLP Joint Brief at 13-16.

[50] PMLP Joint Brief at 13 ("The [Massachusetts] Formula does not provide for the bottom of the pole, or the support space without which the usable space would not exist. Under the [Massachusetts] Formula, the costs associated with the support space are subsidized or borne by IOU's electric ratepayers or IOUs' stockholders . . . .").

[51] *See* Comcast Brief at 11 ("The costs of the entire pole are included in that calculation.").

[52] Section 25A (emphasis added).

[53] PMLP is confusing the *cost allocator* (based on the percentage of usable space occupied by an attacher) with the costs being allocated (costs of the entire pole, including both useable and unusable space).

As the legislative history of the 1978 federal Pole Act explained, this cost allocation approach is analogous to other well accepted, familiar contexts such as an apartment house:

> The renter of one of the ten units pays the cost of that unit plus one-tenth of the cost of all common areas. He does not pay one-half the cost of the common areas just because only one other person occupies the other nine units, but rather he pays his one-tenth share of all the costs attributable to the building.[54]

Consistent with this common and equitable cost allocation approach, Congress specifically designed the FCC Formula (and the cost allocation in the Massachusetts Formula is the same) to allocate an appropriate share of the cost of the *entire* pole to cable attachers:

> Cable would pay its share of not just the costs of . . . usable space but of the total costs of the entire pole, *including the unusable portion* (below grade and between minimum clearance levels.) This allocation formula reflects the concept of relative use of the entire facility. To the extent that a pole is used for a particular service in greater proportion than it is used for another service, the relative costs of that pole are reflected proportionately in the costs of furnishing the service which has the greater amount of use.[55]

While PMLP may disagree with the Section 25A and Massachusetts Formula approach to cost *allocation*, there is nothing inequitable or unusual about it. As explained in Comcast's Brief, the FCC Formula has repeatedly been found by the courts as well as by federal and state agencies to be fully compensatory, based on fully-allocated costs and to not subsidize attachers.[56]

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[54] 123 Cong. Rec. H 5080 (daily ed. May 25, 1977) (statement of Rep. Wirth).

[55] S. Rep. No. 95-580 at 20, *reprinted in* 1978 U.S.C.C.A.N. 109, 128 (emphasis added).

[56] Comcast Brief at 12-13. *See also Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5309 (2011), *aff'd, American Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013) ("The cable rate formula has been upheld by the courts as just, reasonable, and fully compensatory. . . ."); Omnibus Broadband Initiative, Federal Communications Commission, Connecting America: The National Broadband Plan 110 (2010), *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf ("[The FCC cable formula] has been in place for 31 years and is 'just and reasonable' and fully compensatory to utilities.").

Moreover, the Massachusetts Formula establishes the attachment rate at the *high* end of the rate range permitted by Section 25A.[57]

PMLP argues that the Massachusetts Formula does not "acknowledge that the interests of MLP ratepayers should be weighed by the Department in determining the just and reasonable pole attachment rate." This assertion cannot be reconciled with (or provide any basis for changing) the Department's determination in *A-R Cable Services* that "the Department's pole attachment formula reasonably balances the interests of subscribers of CATV services as well as the interests of consumers of *utility* services as required by [Section 25A]."[58]

## IV. THE PROVISION OF NEW SERVICES DOES NOT MAKE THE MASSACHUSETTS FORMULA INAPPLICABLE

PMLP contends that the Massachusetts Formula should no longer apply to Comcast because previously it only provided cable services but is now a "global fortune 500 company that has expanded into areas of business and home high-speed internet service, digital phone service and home security."[59] Because the Massachusetts Formula more than fully compensates MLPs for attachment space and establishes the rate at the highest point in the range allowed by Section

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[57] Section 25A provides that a just and reasonable rate can be as low as the incremental cost of attaching to a pole. Instead the Massachusetts Formula (like the FCC Formula) calculates fully allocated cost rates reflecting an appropriate share of all operating and capital costs related to the pole attachment. Note that as recently as the first quarter of 2011 PMLP charged Comcast $12.00 per solely owned pole – a rate very much aligned with the Massachusetts Formula. *See* Comcast Complaint at 4.

[58] *A-R Cable Services* at 7 (emphasis added). As discussed, the defined term "utility" includes MLPs under Section 25A. It is also important to note that the provision of space on poles is not a "zero sum" game where the attacher gains at the expense of the utility or its rate-payers. To the contrary, the utility and its rate-payers would simply bear the same costs as without the attacher but without any contribution towards those costs. This fact was recognized by Congress when it enacted the 1978 Pole Attachment Act. *See* S. Rep. No. 95-580 at 16, *reprinted in* 1978 U.S.C.C.A.N. at 124 ("CATV offers an income-producing use of an otherwise unproductive and often surplus portion of plant.").

[59] PMLP Joint Brief at 17.

25A, there is no legal or policy rationale to impose such an extra-compensatory surcharge.[60] Indeed, courts and state regulatory commissions have rejected the principle that pole owners can penalize attachers due to the provision of new communications services.

For example, the United States Supreme Court upheld the FCC's determination that cable operators could not be charged an attachment rate higher than provided for by the FCC's cable television formula because the cable operator also provided high-speed Internet service.[61] Just last year, the D.C. Circuit Court of Appeals unanimously affirmed the FCC's decision to *lower* attachment rates for attachers carrying phone services to the FCC's cable rate.[62] In 2005, the Connecticut DPUC upheld the State's cable based formula rate of $5.83 rate for all attachments of the electric utility United Illuminating ("UI") and declined to impose a surcharge for Internet and phone services, noting:

> the Department is not persuaded that there are any incremental real costs to UI from a pure cable company wire that provides only cable services and a cable company wire that also provides internet and telecommunication services. Therefore, there do not appear to be any real cost impacts to UI as a result of this ruling.[63]

Similarly, the California PUC has ruled "[t]here is generally no difference in the physical connection to the poles or conduits attributable to the particular service involved. . . . Moreover,

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[60] Moreover, any such rate discrimination based on the size of the attaching company or services it provided would violate the MLP's obligation not to discriminate among attachers. *See* 220 CMR § 45.03(1) ("A utility shall provide a licensee with *nondiscriminatory* access to any pole . . .") (emphasis added).

[61] *NCTA v. Gulf Power Co.*, 534 U.S. 327 (2002). In rejecting the pole owner's argument for higher rates for new services the Court stated: "On their view, if a cable company attempts to innovate at all and provide anything other than pure television, it loses the protection of the Pole Attachments Act and subjects itself to monopoly pricing." 534 U.S. at 339.

[62] *See Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, ¶¶ 135-198.

[63] *Petition of the United Illuminating Company For A Declaratory Ruling Regarding Availability of Cable Tariff Rate for Pole Attachments By Cable Systems Providing Telecommunications Services and Internet Access*, Docket No 05-06-01, Decision, 2005 Conn. PUC LEXIS 295, at *11-12 (Dec. 14, 2005).

such an approach promotes the incentive for facilities-based local exchange competition through the expansion of existing cable services . . . .[64]

Accordingly, the Department should reject PMLP's effort to discriminate among attachers and to penalize communications providers for the deployment of new services.

## V. THE DEPARTMENT'S STATUTORY AUTHORITY TO REGULATE MLP POLE ATTACHMENT RATES DOES NOT CONFLICT WITH MUNICIPAL ELECTRIC RATE-SETTING AUTHORITY

PMLP asserts that "AMLP's and PMLP's publicly elected commissions have determined the allocation between the electric ratepayers and the cable ratepayers based on fully allocated cost-of-service studies."[65] Moreover, PMLP contends that "if the application of the [Massachusetts] Formula . . . – without cost allocation evidence – results in shifting costs to electric ratepayers, then the Department would have substituted its judgment for judgment of the publicly elected light commissioners of AMLP and PMLP who have exclusive legal jurisdiction to set rates in their communities." This position completely ignores the fact that Section 25A specifically gives the Department explicit and exclusive authority over the maximum pole attachment rate that can be charged by MLPs, including PMLP and AMLP.[66]

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[64] *Order Instituting Rulemaking on the Commission's Own Motion Into Competition of Local Exchange Service*, R.95-04-043, I.95-04-044, Decision 98-10-058, 1998 Cal. PUC LEXIS 879 (Oct. 22, 1998) (citations omitted).

[65] PMLP Joint Brief at 18.

[66] Indeed, as the DPU noted, "the statutory framework and judicial interpretation of that framework indicate that the Department sought to defer to the judgment of elected municipal officials in many matters pertaining to management of municipal light plants. . . . The Department does, however, have review authority over certain actions of municipal light plants and, while it will defer to the judgment of municipal officials, the Department cannot ignore its oversight responsibilities." DPU 96-100 at 32. Section 25A could not have been more explicit in giving the Department such review authority and oversight responsibilities.

In any event, when the Legislature provided the DTE with exclusive authority to set attachment rates for all utilities, including MLPs, it also required the DTE to consider the interests of utility customers and attachers' customers. The Legislature did *not* provide MLPs with authority to set pole attachment rates or to balance these constituent interests.[67] The DTE established a fully allocated method for setting attachment rates consistent with Section 25A and with established and current judicial and agency precedents. Accordingly, there is no conflict between any purported "exclusive" legal jurisdiction by MLPs to set electric rates and the authority duly accorded to the Department to set PMLP's pole rates here.[68]

## CONCLUSION

For all of the reasons discussed above, the Department should rule that the Department's Massachusetts Formula applies to MLPs, including PMLP.

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[67] The Legislature made this policy judgment for good reason because MLPs, like other pole owners with control over bottleneck infrastructure, have a financial incentive to impose excessive pole rents on attachers. As the U.S. Supreme Court observed in *Gulf Power*, "[s]ince the inception of cable television, cable companies . . . have found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge monopoly rents." 534 U.S. at 330.

[68] The PMLP Joint Brief references a pole attachment agreement between Comcast and AMLP and argues that applying the Massachusetts Formula to MLPs would be "reforming the Pole Attachment Agreement." PMLP Joint Brief at 18 n.2. As explained in the Hearing Officer's June 23 Order, the AMLP pole rate and contract are not the subject of this complaint proceeding regarding the attachment rates demanded by PMLP. June 23 Order at 9. Any issues regarding the interrelationship of the Massachusetts Formula and the AMLP pole attachment agreement are irrelevant to this proceeding and can be resolved at the appropriate time.

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## CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2014, I served the foregoing document by personal delivery and first-class U.S. Mail to the attached Service List in accordance with the requirements of 220 CMR 1.05.

Kevin Conroy